

★ AUG 22 2005 ★

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

MUSHAHADA INTERNATIONAL USA, INC.,

Plaintiff,

-against-

ACCESS POINT, INC.,

Defendant.

X

04 CV 5270 (ARR)

NOT FOR ELECTRONIC  
OR PRINT  
PUBLICATION

OPINION AND ORDER

X

ROSS, United States District Judge:

By order dated June 15, 2005, the court denied plaintiff Mushada's motion to dismiss defendant's counterclaim for fraud in the inducement. By papers dated August 12, 2005, defendant Access Point seeks a default judgment, arguing that Mushahada failed to file its responsive pleading to defendant's counterclaim following the court's previous order within the ten days allotted by Fed. R. Civ. P. 12(a)(4)(A). Mushahada filed its responsive pleading to defendant's counterclaim on August 16, 2005, after the allotted period had passed.

Were the court to enter a default judgment, Mushada could move to vacate by showing that: (1) the default was not willful; (2) setting aside the default would not prejudice Access Point; and (3) Mushahada has a meritorious defense. Enron Oil Corp. v. Diakuhara, 10 F.3d 90, 96 (2d Cir. 1993). The Second Circuit has stated that "[t]he test of [a meritorious] defense is measured not by whether there is a likelihood that it will carry the day, but whether the evidence submitted, if proven at trial, would constitute a complete defense." Pecarsky v. Galaxiworld.com Ltd., 249 F.3d 167, 173 (2d Cir. 2001) (internal quotation marks and citation

omitted). Because Mushahada could clearly make the requisite showing under Enron Oil, the court denies defendant's motion for a default judgment.

SO ORDERED.

---

Allyne R. Ross  
United States District Judge

Dated: August 18, 2005  
Brooklyn, New York

SERVICE LIST:

Attorney for Plaintiff  
Joseph Paul Goldberg  
Bondy & Schloss, LLP  
60 East 42nd Street, 37th Floor  
New York, NY 10165

Attorney for Defendant  
Jonathan K. Cooperman  
Kelley Drye & Warren LLP  
101 Park Avenue  
New York, NY 10178

cc:      **Magistrate Judge Joan M. Azrack**